STATE OF MICHIGAN
IN THE SUPREME COURT

DAIMLERCHRYSLER CORPORATION,	**Supreme Court Docket No. _____**
Petitioner-Appellant,	**Court of Appeals Docket No. 262518**
v	
MICHIGAN DEPARTMENT OF TREASURY,	**Hon. Kirsten Frank Kelly** **Hon. Patrick M. Meter** **Hon. Alton T. Davis**
Respondent-Appellee.	**MTT Docket No. 295872** **Hon. Patricia Halm**

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PETITIONER-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF JURISDICTION AND GROUNDS FOR APPEAL TO THE SUPREME COURT

A. Jurisdiction

This *Application for Leave to Appeal* ("*Application*") is filed under MCR 7.302 from the published *per curiam* decision of the Michigan Court of Appeals (the "*Opinion*") dated November 1, 2005, issued by the Honorables Kirsten Frank Kelly, Patrick M. Meter, and Alton T. Davis. A copy of the Court of Appeals' *Opinion* is attached to this *Application* as **Exhibit "A."** The Michigan Tax Tribunal's ("MTT's" or "Tribunal's") *Final Decision on Proposed Order Granting Respondent's Motion for Summary Disposition and Denying Petitioner's Motion for Summary Disposition* issued on April 20, 2005, adopting the MTT's September 23, 2004 *Proposed Order Granting Respondent's Motion for Summary Disposition and Denying Petitioner's Motion for Summary Disposition*, as affirmed by the Court of Appeals, is attached as **Exhibit "B."** This *Application for Leave to Appeal* is timely brought before this Court under MCR 7.302(C)(4)(a) because it is filed within 42 days after the Court of Appeals issued its final determination in this case.

B. Grounds for Application Under MCR 7.302(B)(1), (2), (3) and (5

Three of the six grounds for appeal identified in MCR 7.302(B) are unequivocally presented by the matter now before this Court, as Petitioner-Appellant DaimlerChrysler Corporation ("Daimler") will more fully show through its *Statement of Facts* and *Arguments, infra:*

- First, grounds for review by this Court under ***MCR 7.302(B)(2) and (3)*** clearly exist because this case involves the collection and proper refunding of tax by Respondent-Appellee, the Michigan Department of Treasury ("the Department"), an agency of Michigan's

executive branch. As such, significant public interest exists with respect to the questions presented, including the appropriate and fair collection and refunding of a tax as enacted by the Legislature, and the case is brought against the State or one of its agencies or subdivisions (the Department) – grounds under MCR 7.302(B)(2). Significant public interest exists not only as to the motor fuel tax refund issue extant in this matter – a case of first impression under a relatively brand-new and untested motor fuel tax enactment – but also with respect to the extremely viable assertion tendered by Daimler here, one erroneously rejected by both the MTT and the Court of Appeals, that *its activities are such that it is not subject to the provisions of the Michigan Motor Fuel Tax Act ("MFTA" or "the Act"),* 2000 PA 403, *as amended,* MCL 207.1001 *et seq., so that any effort on the part of the Department to apply those provisions to this taxpayer cannot be countenanced.* This case presents serious issues of grave import to Michigan taxpayers as a whole, for it not only addresses specialized issues focused upon a unique and new tax enactment, the MFTA, but also has potential widespread impact as to taxpayers in general who seek to obtain refunds of tax unlawfully imposed upon them.

- Ample additional grounds for review by this Court exist under ***MCR 7.302(B)(5)*** because the Court of Appeals – in deciding, *inter alia*, that Daimler's activities as outlined in this matter are subject to the MFTA; is not a "user" of motor fuel in its industrial processing activities; cannot seek a refund of unlawfully paid motor fuel tax because (according to the court and Tribunal below), no provision exists through which a refund may be awarded; and has suffered no constitutional deprivation even though it has no recourse to obtain a legitimately-awarded tax refund under the MFTA – has issued a determination that is clearly erroneous as a matter of law.

- Finally, leave to appeal is fully warranted under ***MCR 7.302(B)(1), (2) and (3)*** because the question of whether the MFTA allows for a refund of motor fuel tax that has been paid in an instance that is patently contrary to the expressly stated purpose and intent underlying the Act constitutes a matter of major significance to the taxing and general civil jurisprudence of this State. Moreover, this matter has major jurisprudential significance in that, if the Court of Appeals and the MTT are correct in their stated interpretations that the Act does not permit a refund of motor fuel tax under the circumstances confronting Daimler, constitutional implications are brought into play. And the issue of whether the MFTA in its present form impairs Daimler from a due process perspective involves a substantial question as to the validity of a legislative act.

STATEMENT OF QUESTIONS PRESENTED

1. **DID THE COURT OF APPEALS RENDER A CLEARLY ERRONEOUS DECISION ON A NUMBER OF COUNTS THAT WILL CREATE A MATERIAL INJUSTICE, SO THAT THIS MATTER IS APPROPRIATE FOR A GRANT OF LEAVE TO APPEAL AND CONSIDERATION BY THIS COURT UNDER MCR 7.302(B)(5)?**

   Petitioner-Appellant says "Yes."
   Respondent-Appellee says "No."
   The MTT would say "No."
   The Court of Appeals says "No."

2. **DOES THE PRIMARY ISSUE PRESENTED BY THIS CASE – WHETHER THE MFTA PROVIDES A MECHANISM WHEREBY A TAXPAYER WHO HAS PAID MOTOR FUEL TAX FOR A USE OF MOTOR FUEL THAT IS NOT WITHIN THE INTENDMENT OF THE MOTOR FUEL TAX ACT MAY RECEIVE A REFUND OF THE TAX – HAVE SIGNIFICANT PUBLIC INTEREST AND INVOLVE AN AGENCY OF THE STATE OF MICHIGAN; PRESENT LEGAL PRINCIPLES OF MAJOR SIGNIFICANCE TO THIS STATE'S JURISPRUDENCE; AND INVOLVE A SUBSTANTIAL QUESTION AS TO THE VALIDITY OF A LEGISLATIVE ACT, SO THAT AMPLE GROUNDS FOR REVIEW BY THIS COURT EXIST UNDER MCR 7.302(B)(1), (2) AND (3)?**

   Petitioner-Appellant says "Yes."
   Respondent-Appellee says "No."
   The MTT would say "No."
   The Court of Appeals says "No."

CONCISE STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

A. The Record.

The MTT did not conduct a hearing in connection with this matter, inasmuch as the case was presented for the MTT's consideration on the parties' cross-motions for summary disposition under MCR 2.116(C)(10); accordingly, no evidentiary record exists that can be referenced by the parties to this *Application*.

B. Introduction and Summary of Issues

Amazingly, Daimler ***once again is before this Court to respectfully request reversal of the lower court's and Tribunal's determinations that have effectively withheld from it the right to receive a refund of motor fuel taxes ("MFT") it cannot be required to pay because it does not consume or use the motor fuel in question over Michigan public roads and highways consistent with the intent of the MFTA.*** Just last year, Daimler was before this Court with respect to its MFT claims under the formerly-effective version of the MFTA that the four-year limitations period provided to taxpayers under §30 of the Revenue Act, 1941 PA 122, *as amended,* MCL 205.1 *et seq.;* MCL 205.30 is operative as to it, not the one-year limitations period stated in the then-applicable MFTA, which the Department attempted to apply in an effort to deprive this taxpayer of clearly payable tax refunds. In an *Order* it issued in lieu of granting leave to appeal, this Court determined that the four-year limitations period applied – thus affording Daimler its requested MFT refunds – not the highly-restrictive one-year period offered by the Department. *See, DaimlerChrysler Corporation v Dep't of Treasury, 258 Mich App 342; 672 NW2d 176 (2003), rev'd 469 Mich 1032; 679 NW2d 67 (2004).*

The facts of the former case that engendered most favorable treatment at the hands of this Court are ***identical*** to those present in this case, *i.e.,* we continue to address the question of the availability of MFT refunds for motor fuel that Daimler injects into the motor fuel tanks of vehicles it manufactures in Michigan and ships to non-Michigan destinations for ultimate sale. However, a new version of the MFTA has been in place since April 1, 2001, and it is this enactment that Daimler has been obligated to look to for these requested MFT refunds. ***Yet, as was the case with Daimler's claims for tax refunds under the old version of the MFTA, the Department has thrown out some barrier – this time, the assertion that there is no mechanism at all under the MFTA to refund the tax to Daimler – to counter this taxpayer's legitimate efforts to simply obtain a return of that which has been improperly exacted.***

Under MCR 7.302, Daimler applies for *Leave to Appeal* from the published *per curiam Opinion* issued by the Court of Appeals on November 1, 2005. The Court's *Opinion* (1) affirmed the MTT's determination to deny relief to Daimler on the critical MFT issue presented by this case – the Court concluded that no provision at all is available to Daimler under the language of the new MFTA to enable it to obtain a refund of MFT paid for a nontaxable use of motor fuel; and (2) affirmed the MTT's ruling that no constitutional issues attend the current MFTA's abject failure – at least as the MTT and the Court of Appeals have held – to provide this taxpayer with a means of relief for a tax that is patently outside the scope of the enactment. This *Application for Leave to Appeal* respectfully requests that this Court review both of these issues.

In this case, both the MTT and the Court of Appeals failed to understand that Daimler in fact ***is*** eligible to obtain the requested MFT refund under a variety of provisions

of the new MFTA, and that, if no avenue of relief is provided in the Act for a refund of a tax paid under circumstances that are entirely outside of its permissible scope, severe constitutional infirmities exist. In continuing to assert its right to withhold legitimately-claimed MFT refunds from Daimler, the Department additionally has ignored its own guidance concerning the permissibility of subjecting Daimler to tax under these circumstances. And neither the MTT nor the Court of Appeals properly attended to the well known, governing precept that laws involving the imposition of a tax are to be construed in favor of the taxpayer, and against the government, for the reason that they entail the appropriation of the taxpayer's funds or property. The Tribunal's and Court's interpretations in this case do a grave disservice to the notion that taxpayers and the state revenue authority generally should be able to work rationally and cooperatively relative to the proper interpretation and enforcement of tax laws, and – strangely in this time of grave concern for the industrial future of Michigan – set a most unwelcome table for this manufacturing and tax-revenue-generating giant.

C. Statement of Facts - The Taxpayer, Its Business Activities, Its Motor Fuel Tax Payments, and Its Refund Request to the Department.

In awarding summary disposition to the Department in this case under MCR 2.116(C)(10), the MTT determined the absence of genuine issues of material fact. The following are the uncontested facts of this case:

Daimler is a Michigan taxpayer with its principal place of business in Auburn Hills, Michigan [*Amended Petition for Review* dated March 9, 2005 *("APFR")*, ¶ 1]. During the tax period in issue in this case – beginning with the first effective date of the new MFT legislation, April 1, 2001, through June 30, 2001 ("the period in issue") –

Daimler manufactured automobiles and trucks at various assembly plants in Michigan (*APFR*, ¶ 10).

During the period in issue, Daimler received by transport truck or tank wagon motor fuel that it used in its industrial processing activities and placed the motor fuel into storage facilities at its Michigan manufacturing plants [*Matthews Affidavit* accompanying *Petitioner's Response to Respondent's Motion for Summary Disposition and Request for Judgment Pursuant to 2.116(I)]*. As part of its industrial processing activities relative to vehicle manufacture, and in accordance with vehicle specifications, Daimler placed a predetermined amount of this gasoline into the fuel supply tank of each new vehicle (*APFR* ¶ 10). This gasoline was an incident of Daimler's vehicle manufacturing process. (*APFR*, ¶ 11). While some of the vehicles Daimler manufactured in Michigan remained in this state for sale at dealerships, others were transported outside of Michigan by common carrier. (*APFR*, ¶ 12). As concerns vehicles it assembled in Michigan but transported out of state upon manufacture, Daimler did not use or consume on Michigan public roads or highways the predetermined gasoline it added to the vehicle tanks as part of its industrial processing activities. (*APFR*, ¶ 12). *In this case, the Department does not contest that Daimler used the motor fuel for which refund is sought for nonhighway purposes.* Daimler was not engaged in the business of exporting motor fuel at any time during the period in issue (*APFR*, ¶ 11).

For the period in issue, Daimler paid $319,709 in MFT with respect to gasoline it added to vehicle fuel tanks as part of its Michigan manufacturing process in instances in which the vehicles were shipped outside of Michigan by common carrier upon manufacture. (*APFR*, ¶ 8). On June 29, 2001, Daimler filed a claim for refund of MFT

inappropriately held by the Department in the amount of $309,205. (*APFR,* ¶¶ 2, 16). At the Department's request, Daimler provided written correspondence dated March 26, 2002, and included materials Daimler originally had provided to the Department in support of its refund claim, together with additional supporting schedules; this correspondence identified an error in computing the amount of MFT to be refunded, so that the originally-requested amount was adjusted to $319,709 (*APFR,* ¶¶ 3, 16). By letter dated November 12, 2002, the Department denied Daimler's refund claim, citing the following as the exclusive reason for its denial:

> You are not licensed to export gasoline. For further information, please refer to the enclosed letter regarding the tax treatment of motor fuel export [*sic*] from Michigan. (*APFR,* ¶ 4).

The "letter" that the Department identified in its November 12th refund claim denial states:

> Section 47 of the MFTA states in part that "a person may otherwise seek a refund for tax paid under this act on motor fuel pursuant to section 30" of the act. Section 30 of the MFTA lists the circumstances under which motor fuel is exempt from the motor fuel tax. Subsection (3) of section 30 states that motor fuel is exempt from the tax if the motor fuel "is fuel for which proof of export is available in the form of a terminal-issued destination state shipping paper under any of the following circumstances" (i) the motor fuel is exported by a supplier who is licensed in the destination state (ii) until December 31, 2000, the motor fuel is sold by a supplier to a licensed exporter for immediate export (iii) the motor fuel is sold by a supplier to another person for immediate export to a state for which the destination state fuel tax has been paid to the supplier who is licensed to remit tax to that destination state. MCL 207.1036MCL 207.1043

On December 17, 2002, Daimler timely appealed the Department's November 12, 2002 refund claim denial to the MTT, and on October 15, 2004 and March 9, 2005, amended its originally filed *Petition.* Daimler's second *Amended Petition for Review* set

forth several bases for reversal of the Department's denial of Daimler's refund claim, *inter alia:* (1) that imposition of MFT under the circumstances presented is wholly outside the scheme and scope of the MFTA; (2) that the MFTA specifies that one of its underlying intents is to accord refunds for the nontaxable use of motor fuel; (3) that Daimler's refund claim was properly tendered in accordance with the refund provisions of the MFTA; (4) that the letter issued by the Department that accompanied its November 12th refund claim denial erroneously refers to, and discusses, §30 of the MFTA, not the provision identified in the MFTA, *i.e.,* § 30 of the Revenue Act, 1941 PA 122, *as amended,* MCL 205.1 *et seq.*; (5) that the only documentary requirements for MFT refund claims are those set forth in MCL 207.1048, with which Daimler complied; (6) that Daimler is not required to be licensed as an exporter of motor fuel; (7) that Daimler qualifies for refund of MFT under MCL 207.1087 as "[a]n end user who exports fuel in the fuel supply tank of a licensed motor vehicle where the fuel is used only to power the vehicle . . ."; (8) that Daimler is an "industrial end user" as that term existed in the MFTA during the period in issue, and so is not an exporter of motor fuel; (9) that the Department's application of the MFTA to Daimler so as to deny it its MFT refund contravenes equal protection and due process guarantees afforded under the United States Constitution; and (10) that Daimler is entitled to its claimed tax refund under MCL 207.1039. (*APFR,* ¶¶ 13 through 37).

D. The MTT's *Final Decision on Proposed Order Granting Respondent's Motion for Summary Disposition and Denying Petitioner's Motion for Summary Disposition.*

On April 30, 2004, the Department moved for summary disposition under MCR 2.116(C)(10), contending that because Daimler is not licensed as a motor fuel exporter

and has not shown that it has paid MFT to destination states, it has no right to an MFT refund. Daimler provided a written response to the Department's *Motion*, and also moved for entry of summary disposition in its favor as permitted by MCR 2.116(I). The Department furnished a response to Daimler's request for entry of judgment in its favor, in which it concurred that Daimler is not an exporter of motor fuel under MFTA provisions.

MTT Administrative Law Judge Thomas A. Halik issued his *Proposed Order Granting Respondent's Motion for Summary Disposition and Denying Petitioner's Motion for Summary Disposition* on September 23, 2004 (Appendix "2"). In his *Proposed Order*, Judge Halik strictly construed the MFTA's exemption provisions in favor of the taxing unit (*Proposed Order, p 9*); determined that Daimler cannot properly reply upon the "intent" provisions of the MFTA to seek and obtain its requested MFT refund (*Proposed Order, pp 10-11*); concluded that Daimler cannot enlist any "nontaxable purpose" under the MFTA in support of its refund claim (*Proposed Order, pp 11, 14*); stated that Daimler does not seek a refund as an "end user" under the MFTA, and would not qualify as an "end user" (*Proposed Order, pp 11-12*); found that it need not address Daimler's "industrial end user" assertions (*Proposed Order, p 15)*; rejected Daimler's assertions that two Internal Revenue Service Revenue Rulings, Rev Rul 69-150 and Rev Rul 67-413, assist it in its determination in this case (*Proposed Order, p 15*); and, finally, concluded that Daimler's constitutional assertions are without merit because "Respondent has not denied Petitioner a remedy" (*Proposed Order, p 15*).

Daimler offered objections to ALJ Halik's *Proposed Order,* and on November 22, 2004, the MTT issued its *Order to Submit Briefs on Legal Issue,* stating that

> the Tribunal determines that further briefing is necessary before a final order is issued . . . . **The Tribunal finds that there remains a legal issue as to whether Petitioner is entitled to a refund of motor fuel tax under MCL 207.1033 or MCL 207.1039; specifically, whether Petitioner is an "end user" who used the fuel for nonhighway purposes within the meaning of either of these refund provisions.** (emphasis in text)

In its opening submission in response to the MTT's briefing order, Daimler posited that it, in fact, is an "end user" under MFTA provisions, and, as such, is entitled to relief under MCL 207.1033 or MCL 207.1039. The Department, in its *Brief on Legal Issue in Regard to MCL 207.1033 or MCL 207.1039,* again acknowledged that Daimler is not an exporter of motor fuel placed in the tanks of vehicles assembled in Michigan, and, importantly, admitted that "[t]he Petitioner may be an 'end user' in other circumstances as that term is used in Section 33 of the MFTA, MCL 207.1033," although it did not specify what those "other circumstances" might be.

On April 20, 2005, Tribunal Judge Patricia L. Halm issued her *Final Decision on Proposed Order Granting Respondent's Motion for Summary Disposition and Denying Petitioner's Motion for Summary Disposition*, in which she adopted Judge Halik's *Proposed Order* but added certain considerations, specifically the conclusion that Daimler "is not the 'end user' of the motor fuel and therefore is not entitled to a refund for motor fuel tax under the MFTA." (Exhibit "B", p 2).

E. Proceedings in, and the Determination of, the Court of Appeals.

Daimler timely filed its *Claim of Appeal* with the Michigan Court of Appeals on May 9, 2005. Upon consideration of the parties' submissions, the Court of Appeals' panel consisting of the Honorables Kirsten Frank Kelley, Patrick M. Meter, and Alton T. Davis issued its *Opinion* on November 1, 2005, in which:

- The court disagreed with Daimler's assertions that the MTT erred in its conclusion that it is ineligible to receive motor fuel tax refunds under the current version of the MFTA for gasoline it injects into the fuel tanks of vehicles during its Michigan manufacturing processes when those vehicles are destined for shipment out-of-state. In this regard, the Court of Appeals determined that Daimler cannot properly claim an MFT refund under §33 and §39 of the MFTA because, in the court's estimation, a claimant under either of those sections must be an "end user" of motor fuel, and Daimler, according to the court, was not an "end user." Exhibit "A," pp 4-5. In a footnote, the Court of Appeals also dispensed with Daimler's assertions that it qualifies for relief under the express provisions of the MFTA as either a "bulk end user" or an "industrial end user." Exhibit "A," p 5, fn 5.

- The court additionally held that Daimler cannot claim its MFT refund under MFTA §47 because, as the court stated, that provision was not intended to encompass non-end users of motor fuel; because MFTA §47 instead is intended to apply only under restricted circumstances, Daimler cannot rely upon that provision as furnishing grounds for relief.

- And, finally, the court rejected Daimler's claim that the failure of the MFTA to provide it with an avenue for refund of a tax imposed outside the expressly-stated intent underlying the MFTA violates due process rights guaranteed to it under the United States and Michigan Constitutions. Instead, the court determined that the MFTA provided ample means for obtaining a refund, and it simply was the case that, as that court believed, Daimler is ineligible under the appropriate mechanisms provided.

As is more intensively set forth in the *Argument* portion of this *Application,* several clear grounds for a grant of leave to appeal are satisfied by this case, and warrant consideration by this Court of the Court of Appeals' *Opinion,* one that is erroneous as a matter of law in several respects, pernicious to the taxation jurisprudence of this State, oblivious to the Department's own policy interpretation as to how motor fuel taxes apply (or do not apply) to manufacturers such as Daimler, and defiant of what approach should be applied to properly interpret legislative intent in the context of a tax statute.

ARGUMENT

I. THE COURT OF APPEALS RENDERED A CLEARLY ERRONEOUS DECISION ON A NUMBER OF COUNTS THAT WILL CREATE A MATERIAL INJUSTICE, SO THAT THIS MATTER IS APPROPRIATE FOR A GRANT OF LEAVE TO APPEAL AND CONSIDERATION BY THIS COURT UNDER MCR 7.302(B)(5).

A. Overview of the Pertinent Statutory Scheme.

Michigan's MFTA, in its prefatory description, states that it is an act "to prescribe a tax on the sale and use of certain types of fuel in motor vehicles ***on the public roads of highways of this state . . .***" (emphasis supplied). Under MFTA §8, MCL 207.1008(1), "[s]ubject to the exemptions provided for in this act, tax is imposed on motor fuel imported into or ***sold, delivered, or used in this state*** at [various rates]" (emphasis supplied). Consistent with the former version of the MFTA that was the subject of Daimler's last appellate MFT refund litigation, the current enactment has a decided focus upon the imposition of MFT for the privilege of operating vehicles on Michigan public roads and highways, *see, e.g.,* MCL 207.1004(j); MCL 207.1008(5)(a); MCL 207.1026(1); MCL 207.1033; and MCL 207.1039. ***It is particularly important to note that, in the context of the present MFT statutory scheme, persons or entities that acquire motor fuel are obligated to pay the tax at the time of acquisition, and are left to seek redress for instances in which the tax was not properly or lawfully payable.***

The MFTA specifically codifies four distinct intents, two of which are significant in the context of this case. Thus,

> It is the intent of this act:
>
> (a) To require persons who operate a motor vehicle on the public roads or highways of this state to pay for the privilege of using those roads or highways.
>
> * * *

(b) To allow persons who pay the tax imposed by this act and who use the fuel for a nontaxable purpose to seek a refund or claim a deduction as provided in this act. MCL 207.1008(5)(a) and (c).

Accordingly, the Michigan Legislature has expressly identified in the language of the enactment itself both that the tax is intended to be imposed on those who operate a motor vehicle on Michigan public roads and highways, and that those who use the motor fuel for a nontaxable purpose may seek a refund or deduction. Without a doubt – and as the Court of Appeals clearly failed to apprehend in this case – Michigan's motor fuel tax is inextricably linked to the privilege of operating a motor vehicle on Michigan public roads and highways. This is the case under both the formerly-effective MFTA (under which Daimler most certainly received refunds from the Department) and the currently-effective MFTA (under which the Department asserts that Daimler has no means of receiving a MFT refund). Thus, it is not sufficient for a lawful imposition of the tax for motor fuel to be purchased and merely injected into a vehicle's tank – that motor fuel must be combusted or expended in the operation of a vehicle over Michigan public roads or highways. As concerns the motor fuel in issue in this case – and the Department does not contest this fact -- Daimler at no time combusted or expended the motor fuel in operations on Michigan highways. Instead, all such combustion or use occurred after the newly manufactured vehicle was delivered out of Michigan to a non-Michigan dealer for ultimate purchase by a consumer in another state.

Section 30 of the MFTA, MCL 207.1030, specifies certain MFT exemptions, none of which applies to Daimler's circumstances, although one of them – involving the

exportation of motor fuel, *see,* MCL 207.1030(1)(d) – was the illegitimate focus of the Department's denial of Daimler's refund claim here.

> MFTA § 32, MCL 207.1032, allows for payment of a refund of MFT:
>
> > If a person pays the tax imposed by this act and uses the motor fuel for a nontaxable purpose as described in sections 33 to 47, the person may seek a refund of the tax. To obtain a refund, the person shall comply with the requirements set forth in section 48.

Each of the provisions that establish what MFTA §32 describes as "nontaxable purposes" in actuality is an independent provision allowing for refund under the MFTA. Several of these provisions are critical to the case at hand.

Thus, MCL 207.1033 permits an end user to obtain a refund of motor fuel used for nonhighway purposes:

> > An end user may seek a refund for tax paid under this act on motor fuel used by the person for nonhighway purposes. However, a person shall not seek and is not eligible for a refund for tax on motor fuel used in a snowmobile, off-road vehicle, or vessel as defined in the natural resources and environmental protection act. (citations omitted).

Note this provision's reference to "***an*** end user," and not to "***the*** end user" of motor fuel.[1]

Another refund (actually, a deduction) provision referenced in the MFTA relates to exported motor fuel:

> > A licensed exporter may claim a deduction for tax paid under this act on motor fuel that was placed into storage in this state and was subsequently exported by transport truck or tank wagon by or on

[1] The Department actually has taken a bi-polar position concerning the "end user" issue in Daimler's former and current MFT refund litigation. Thus, in a *Brief* it submitted to the Michigan Court of Appeals in *DaimlerChrysler Corp v Dep't of Treasury, 258 Mich App 342; 672 NW2d 176 (2003),* the Department clearly identified Daimler as an "end user" of motor fuel. Contrast this with the Department's present position, that Daimler is not an "end user" under the MFTA. It is strange (and telling), indeed, that the Department appears to use the term "end user" in any way that it perceives meet its objectives at the time.

behalf of a licensed exporter if both of the following requirements are met:

(a) Proof of export is available in the form of a destination state shipping paper that was acquired by a licensed exporter.

(b) The motor fuel is fuel as to which the tax imposed by this act had previously been paid or accrued. MCL 207.1043

MCL 207.1039 imparts another refund opportunity for "an end user" of motor fuel that uses the fuel for nonhighway purposes:

> An end user may seek a refund for tax paid under this act on motor fuel used in an implement of husbandry or otherwise used for a nonhighway purpose not otherwise expressly exempted under this act. However, a person shall not seek and is not eligible for a refund for tax paid on gasoline used in a snowmobile, off-road vehicle, or vessel as defined in the natural resources and environmental protection act. (citations omitted)

Again, note this provision's reference to "*an* end user", and not to "***the*** end user" of motor fuel.

Finally – and significantly – MCL 207.1047 expressly links Michigan's Revenue Act, 1941 PA 122, *as amended*, MCL 205.1 *et seq.*, to the MFTA, and independently provides for a refund opportunity that arises not under the MFTA, but under the more generic and expansive provisions of the Revenue Act which *inter alia,* establishes the powers and responsibilities of the state's revenue authority, prescribes the manner in which tax assessments are made, addresses the collection of unpaid tax, and speaks to the making of refunds and the time period in which refund claims must be tendered. Section 47 provides that

> [a] person may otherwise seek a refund for tax paid under this act on motor fuel pursuant to section 30 of 1941 PA 122, MCL 205.30. However, the claim for refund shall be filed within 18 months after the date the motor fuel was purchased. MCL 207.1047

The Revenue Act provision identified in MFTA §47, MCL 205.30, permits a taxpayer to claim a refund of overpaid tax in several different settings:

> [T]he department shall credit or refund an overpayment of taxes; taxes, penalties, and interest erroneously assessed and collected; and taxes, penalties, and interest that are found unjustly assessed, excessive in amount, or wrongfully collected with interest at the rate calculated under section 23 for deficiencies in tax payments.

Linked to the MFTA as it is under the auspices of MCL 207.1047, MCL 205.30 indisputably allows for a refund of taxes upon a determination that they have been "unjustly assessed, excessive in amount, or wrongfully collected."

As concerns MFT refunds, MCL 207.1048 outlines the procedure to be adhered to by a refund claimant under the MFTA; note, however, that the Department makes no claim whatsoever in the context of this case that Daimler's refund claim is insufficient in form or documentation.

Finally, Daimler notes that the definitional provisions of the MFTA, *see,* MCL 207.1002 through MCL 207.1006, provide some guidance relative to the issues at hand. Notably, this fairly extensive compilation of definitions does not set forth definitions of the terms "nontaxable use" or "end user," although for the period in issue, it did define "industrial end user" to mean "a person who incorporates motor fuel into, or uses motor fuel incidental to, industrial processing," MCL 207.1003(o)[2], and continues to define the term "bulk end user" to mean "a person who receives into the person's own storage facilities by transport truck or tank wagon motor fuel for the person's own consumption," MCL 207.1002(f).

[2] 2002 PA 668 removed this definition from MCL 207.1003.

B. *The Court of Appeals' Decision is Clearly Erroneous in a Number of Critical Respects and, if Not Reversed will Create a Material Injustice, so that a Grant of Leave to Appeal is Fully Supported under MCR 7.302(B)(5).*

The decision rendered by the Court of Appeals in this case is clearly erroneous – and thereby qualifies this case as an appropriate one for review by this Court – with respect to both its determination that the MFTA provides no mechanism for a MFT refund to Daimler, as well as its conclusion that no due process infirmities attend a scheme in which a MFT taxpayer has no right to relief from payment of a tax that unmistakably is outside of the stated intent of the Act. Clear error is established by the following:

1. *The Court of Appeals clearly erred in holding that Daimler is not an "end user" under any pertinent refund provision of the MFTA.*

To discern the meaning of the term "end user," the Court of Appeals concurred with Daimler that the MFTA does not provide a definition of the term, and so looked to a single dictionary definition of "end user" that speaks to the "ultimate user" of a product. Exhibit "A," p 5. The court also relied upon a provision of the MFTA, MCL 207.1026, which, according to the court, "equates `used or consumed' with `producing or generating power for propelling the motor vehicle.'" Exhibit "A," p 5. In addition, the court, in fn 5 (Exhibit "A," p 5), quickly dispensed with Daimler's assertions that it qualifies both as a "bulk end user" and an "industrial end user" under the express terms of the MFTA, and so fully qualifies to receive the requested tax refunds. Daimler is not a "bulk end user," said the court, because "the evidence does not demonstrate that petitioner received the motor fuel at issue for its own consumption" (Exhibit "A," p 5, fn 5); nor is it an "industrial end user" because "the evidence does not demonstrate that petitioner used the

motor fuel at issue incidental to industrial processing" because "[t]he evidence is clear that petitioner never *used* the fuel" (Exhibit 'A", p 5, fn 5).

The Court of Appeals is simply wrong in its analysis. Two provisions of the MFTA, MCL 207.1033 and MCL 207.1039, expressly allow "an end user" of motor fuel to obtain a refund of tax paid with respect to "nonhighway purposes." Neither "end user" nor "nonhighway purposes" is defined by the MFTA, although during the period in issue, the enactment did provide definitions of more specific types of "end users," *i.e.,* "bulk end users" and "industrial end users." Daimler fully qualifies as "an end user" who, during the period in issue, acquired motor fuel in Michigan that it used for nonhighway purposes, and therefore – contrary to the lower appellate court's analysis – may receive its claimed MFT exemption under either MCL 207.1033 or MCL 207.1039.

Given the ambiguity of the meaning of the term "end user" as that term is found in the MFTA, this Court – as did the Court of Appeals – must refer to accepted rules of statutory interpretation for guidance. The cardinal rule of statutory interpretation is to give effect to the discerned purpose of the Legislature in enacting the provision. *Farrington v Total Petroleum, Inc, 442 Mich 201, 212; 501 NW2d 76 (1993).* This Court recognizes that, when it is called upon to review matters of statutory construction, its primary purpose is to discern and effectuate legislative intent. *People v Morey, 461 Mich 325, 329-330; 603 NW2d 250 (1999).* The interpreting court should first look to the specific statutory language to determine the intent of the Legislature. *House Speaker v State Administrative Bd, 441 Mich 547, 567; 495 NW2d 539 (1993).* The Legislature is deemed to speak through the language it employs in enacting a particular provision, and is presumed to intend the meaning that the statute plainly expresses. *Skybolt Partnership*

v Flint, 205 Mich App 597, 602; 517 NW2d 838 (1994). And, as this Court recognized in *In re Certified Question, 468 Mich 109, 113; 659 NW2d 597 (2003)*:

> A fundamental principle of statutory construction is that "a clear and unambiguous statute leaves no room for judicial construction or interpretation." *Coleman v Furwin, 443 Mich 59, 65; 503 NW2d 435 (1993).* The statutory language must be read and understood in its grammatical context, unless it is clear that something different was intended. *Sun Valley Foods Co v Ward, 460 Mich 230; 596 NW2d 119 (1999).* When a legislature has unambiguously conveyed its intent in a statute, the statute speaks for itself and there is no need for judicial construction; the proper role of a court is simply to apply the terms of the statute to the circumstances in a particular case. *Turner v Auto Club Ins Ass'n, 448 Mich 22, 278; 528 NW2d 681 (1995)*

In considering the issue of whether Daimler qualifies as "an end user" under MCL 207.1033 and MCL 207.1039, the two codified "intents" underlying the MFTA clearly expressed in MCL 207.1008(5)(a) and (c) must be deemed controlling. The Court of Appeals was bound to accede to this paramount intent, and patently erred in failing to do so. Thus, MFTA § 8(5)(a) unmistakably establishes that the MFT is exacted for the privilege of operating vehicles on Michigan public roads or highways – nonhighway use is not within the scope or intent of this enactment, as the refund provisions set forth in MCL 207.1033 and MCL 207.1039 confirm. And MFTA § 8(5)(c) clearly establishes as one of the Legislature's overriding intents that a taxpayer, like Daimler, who uses motor fuel for a nontaxable purpose – such as for nonhighway use – be eligible to receive a refund of the overpaid tax.

Contrary to the Court of Appeals' determination in this case, Daimler fully qualifies as "an end user" under the MFTA in several respects:

First – from the standpoint of common sense evaluated in conjunction with certain legal precepts relating to vehicle assembly – Daimler is "an end user" of motor fuel to the

extent that it uses that fuel in its Michigan industrial processing activities. As previously noted, the "end user" refund provisions found in the MFTA, MCL 207.1033 and MCL 207.1039, do not refer to "***the*** end user of motor fuel," but instead are directed to "***an*** end user." This statutory language obviously dispels the notion that only the "ultimate" user may seek a tax refund, and allows for the recognition of multiple "end users." In injecting motor fuel into the fuel tanks of vehicles as part of its manufacturing process, Daimler makes motor fuel as much a component part of the vehicle as the vehicle's rearview mirror, taillight, or front bumper. *See, e.g.,* Rev Rul 69-150, 1969-1 C.B. 286, which supports the proposition that gasoline injected into a vehicle as part of the manufacturing process becomes a component part of the vehicle, and is no longer a separately identifiable item; *see also, Ammex, Inc v United States, 367 F3d 530 (CA 6, 2004), cert den 2005 US LEXIS 2794 (3/28/05)*, in which the Sixth Circuit Court of Appeals deferred to Rev Rul 69-150 as a seasoned agency interpretation. By virtue of its processing activities, in which it acquired materials in acquisitions at retail that it then used to produce a finished vehicle, Daimler was and is, in fact, "an end user" of the acquired materials used in its manufacturing function – inclusive of the motor fuel for which a MFT refund has been sought.

Second, in its "end user" analysis, the Court of Appeals failed to recognize that courts must give the words used by the Legislature in a particular enactment their common, ordinary meaning. MCL 8.3a; *Rakestraw v General Dynamics Land Systems, Inc, 469 Mich 220, 224; 666 NW2d 199 (2003).* Furthermore, the lower appellate court, in focusing upon a single, general dictionary definition of "end user," failed to understand that this is a term that extends to a number of highly sophisticated technical situations, so

that there is, in fact, more than a single accepted definition of the term. As Daimler stated in its Court of Appeals submission, a general Internet dictionary search using the term "end user" yields a number of commonly-accepted notions of who is an "end user," including any person who uses or consumes a product – a notion that fully comports with Daimler's use of motor fuel in its processing functions. A conclusion that Daimler in fact qualifies as an "end user" of motor fuel in its processing activities is entirely consistent with commonly accepted notions of who is an "end user." The Court of Appeals' conclusion to the contrary represents an unduly restrictive interpretation of just who qualifies as an "end user" under a given set of circumstances, an interpretation that flies in the face of the expressly-stated legislative intent.

Third, the Court of Appeals plainly incorrectly concluded there is no evidentiary base in this case for a determination that Daimler qualifies as a "bulk end user," as that term is defined in MCL 207.1002(f). In fact, Daimler ***is*** a "bulk end user" under the MFTA, and so may receive its requested MFT refund. As previously stated, the MFTA defines the term "bulk end user" to mean "a person who receives motor fuel into the person's own storage facilities by transport truck or tank wagon for the person's own consumption" MCL 207.1002(f). ***Daimler furnished ample documentary evidence relating to its qualification as a "bulk end user" in support of its request for an award of summary disposition in its favor under MCR 2.116(I), showing that it fully satisfies this definition in that it receives motor fuel that it uses in its own industrial processing activities into its own storage facilities at its Michigan manufacturing plants by transport truck or tank wagon.*** (In this regard, *see* the *Matthews Affidavit* that accompanied *Petitioner's Response to Respondent's Motion for Summary Disposition*

and Request for Judgment Pursuant to 2.116(I) – this fully details Daimler's qualification as a "bulk end user" under the MFTA.) That documentation is part of the record developed in this case, and the Court of Appeals' failure to understand this constitutes reversible error. Given that it is a "bulk end user" under the provisions of the MFTA, Daimler necessarily is "an end user" for purposes of the refund provision language set forth in MCL 207.1033 and MCL 207.1039. The Court of Appeals committed a clear error of law in concluding otherwise.

Fourth, the Court of Appeals erred in ruling that Daimler is not "an end user" as that term is used in MCL 207.1033 and MCL 207.1039 because it fails to satisfy the definition of "industrial end user," a term that no longer appears in the definitional portions of the MFTA, but was part of that compilation during the period in issue. MCL 207.1003(o) provides that an "industrial end user" is "a person who incorporates motor fuel into, or uses motor fuel incidental to, industrial processing." Again, an "industrial end user" of motor fuel necessarily also is an "end user," so that the refund provisions outlined in MCL 207.1033 and MCL 207.1039 squarely apply, and enable Daimler to receive the MFT refund withheld from it in this case.

The Court of Appeals' conclusion that "the evidence does not demonstrate that petitioner used the motor fuel at issue incidental to industrial processing" (Exhibit "A," p 5, fn 5) is mystifying at best. If Daimler does ***not*** use the motor fuel in question as part of its industrial processing activities in Michigan, it is difficult to conceive just what it uses it for. The Court of Appeals' statement that the fuel is not used as an incident to Daimler's processing activities is indicative of little more than the panel's inclination to blind itself to reality. That Daimler used the motor fuel in manufacturing

motor vehicles in Michigan is an uncontroverted fact in this case – indeed, the Court of Appeals itself accepts this fact in identifying the facts on p 1 of its *Opinion* (the court said that "[i]n the fuel tank of each vehicle manufactured by petitioner and relevant to this appeal, petitioner placed a certain amount of fuel"). Furthermore, the Court of Appeals, in addressing Daimler's "industrial end user" claim, posits in fn 5 that "[t]he evidence is clear that petitioner never *used* the fuel," apparently compelling the conclusion that because Daimler never "used" the fuel, it cannot be a "user" of any sort. This determination on the part of the Court of Appeals is ludicrous on its face – Daimler clearly "uses" the motor fuel in question as an integral part of its manufacturing/processing activities. Indeed, if, as the Court of Appeals opines, Daimler does not "use" the contested motor fuel at all, ***then it must be concluded that there is no basis whatsoever for imposition of the MFT as to this taxpayer!*** And the lower appellate court's skewed "non-use" analysis directly offends a recognition the identical court made in its *Opinion* in the first *Daimler* motor fuel tax case, where the court in no uncertain terms said that Daimler "used the gasoline by removing it from storage and putting it into the vehicles petitioner produced, which were then driven onto a motor vehicle carrier." *DaimlerChrysler, 258 Mich App at 345.* How Daimler can be viewed in the earlier context as "using the gasoline" it injected into manufactured vehicles, but not in the later, present context under identical facts, is beyond understanding.

Thus, for the foregoing multiple reasons, Daimler ***is*** properly viewed as "an end user" who used motor fuel for nonhighway purposes during the period in issue, and who therefore clearly is due a refund under either MCL 207.1033 or MCL 207.1039. The

Court of Appeals' determinations to the contrary are clearly erroneous and must be reversed.

2. *The Court of Appeals' determination that Daimler cannot obtain its claimed MFT refund in accordance with §30 of the Revenue Act is "clearly erroneous" and warrants review under MCR 7.302(B)(5).*

In addition to the "end user" provisions, both of which work to provide Daimler with a means to obtain the MFT refund it requests in this case, the MFTA sets forth an all-encompassing refund provision that enables a taxpayer to resort, instead, to the general refund provision set forth in §30 of Michigan's Revenue Act, MCL 205.30. This, in fact, is a substantive provision that is "otherwise" available to taxpayers, and that sets forth a variety of bases – more generic in nature – for which a taxpayer may qualify for a refund of Michigan tax, including MFT. Thus, MCL 207.1047 provides:

> [a] person may otherwise seek a refund for tax paid under this act on motor fuel pursuant to §30 of 1941 PA 122, MCL 205.30. However, the claim for refund shall be filed within 18 months after the date the motor fuel was purchased.

According to the Revenue Act provision identified in MFTA §47, MCL 205.30:

> [T]he department shall credit or refund an overpayment of taxes; taxes, penalties, and interest erroneously assessed and collected; and taxes, penalties, and interest that are found unjustly assessed, excessive in amount, or wrongfully collected with interest at the rate calculated under section 23 for deficiencies in tax payments.

Daimler is fully eligible to receive its claimed MFT refund under the auspices of MCL 207.1047 and MCL 205.30 because it has paid MFT in connection with a nontaxable use of motor fuel, *i.e.,* use of that fuel for purposes other than on Michigan public roads or highways, it has paid a tax that has been erroneously assessed and

collected, that is unjustly assessed, that is excessive in amount, and that has been wrongfully collected, as those terms are used in MCL 205.30. The tax Daimler has been made to pay under the MFTA's statutory scheme clearly is for "nonhighway purposes" and is not within the stated scope or intent of the MFTA, *see,* MCL 207.1008(5)(a) and (c). Without a doubt, the circumstances confronting Daimler satisfy one, several, or all of the eligibility requirements for refund specified by MCL 205.30.

The Court of Appeals adopted a different position. In its opinion, the court agreed that Revenue Act §30, as incorporated within the provisions of the MFTA by MFTA §47, in fact represents a separate ground for claiming a MFT refund, *see,* Exhibit "A," p 6. However, although it recognized the independence of this refund mechanism, the court declined to find that Daimler qualified under this provision because, in the court's view, Daimler is not an "end user." Thus, according to the lower court, Daimler fails to qualify for a motor fuel tax refund under those provisions that specifically require the refund applicant to be an "end user," ***and continues to fail to qualify for a motor fuel tax refund under the § 47 provision that does not specifically require the refund applicant to be an "end user" because, as the court says, Daimler is not an end user.*** This interpretation is patently nonsensical and in express derogation of the court's recognition of § 47 as an isolated refund provision unto itself.

And, while the Court of Appeals opined that to allow a taxpayer to claim eligibility for a refund under MFTA §47 would render the "end user" provisions of MFTA §33 and §39 "meaningless because anyone who used the fuel for a nonhighway purpose would be entitled to a refund under §47" regardless of their status as an "end user," the court's interpretation – once again – is unnecessarily, and unlawfully,

restrictive. MFTA §33 and §39 represent provisions directed to an allowance of an MFT refund to an "end user" that uses the fuel for nonhighway purposes. But, as the Legislature recognized in determining in its wisdom to add §47 to the mix of refund avenues, not all persons or entities that acquire motor fuel (and thus pay the tax at the time of acquisition) qualify as "end users," even though their use or consumption of motor fuel is not within the intendment of the MFTA. Section 47 (and § 30 of the Revenue Act, the provision that §47 references and incorporates) exists to squarely address, and provide relief for, such unique circumstances. If the Court of Appeals is correct in rejecting Daimler's claim that it in fact is an "end user" under those provisions allowing "end users" to claim MFT refunds (and Daimler emphasizes that the court is wrong in this respect), then MFTA §47 is fully operative to provide it with the recourse, and the refund, it requires. This situation is ***not,*** as the Court of Appeals asserts, a claim for a refund of "any tax charged on fuel used for any nonhighway purpose," *see,* Exhibit "A," p 6, but instead is a legitimate claim for a refund of a tax that, as imposed, is wholly outside the perimeters of the MFTA, and indeed, contravenes the Department's own policy, as stated in Letter Ruling ("LR") 90-12 (discussed *infra*), that motor fuel tax is not due under these circumstances.

Like the MTT, the Court of Appeals attached an unjustifiably narrow interpretation to the circumstances in which a refund of tax may be made under MCL 205.30, *i.e.,* for overpaid taxes, erroneously assessed and collected taxes, unjustly assessed taxes, excessive taxes, or wrongfully collected taxes. Without a doubt, the taxes for which Daimler seeks refund have been "overpaid," and are liable to refund under MCL 205.30. Neither the Revenue Act nor the MFTA provides a definition of the term

"overpayment." However, the meaning of the term can be gleaned from a review of discussion in the context of federal income taxation focused on "overpayment." Thus, 26 USC § 6401(a), discloses that an "overpayment" includes payment of an assessed tax after the limitations period has expired, 26 USC § 6401(b) considers a refundable credit in excess of a determined tax to be an "overpayment," and 26 USC § 6401(c) characterizes an amount paid as tax as an "overpayment," even if the taxpayer has no liability for the tax. In addition to these federal statutory provisions relating to "overpayment," the United States Supreme Court defined "overpayment" in *Jones v Liberty Glass Co, 332 US 524, 531; 68 S Ct 229; 92 L Ed 142 (1947):*

> [W]e read the word "overpayment" in its usual sense, as **meaning any payment in excess of that which is properly due**. Such an excess payment may be traced to an error in mathematics or in judgment or in interpretation of facts or law. And the error may be committed by the taxpayer or by the revenue agents. **Whatever the reason, the payment of more than is rightfully due is what characterizes an overpayment.** (emphasis supplied)

Critically, the Court of Appeals failed to understand that MCL 205.30 is a "catch-all" refund provision, one which the Legislature offered to taxpayers as a substantive measure for securing refunds when other refund opportunities identified in the MFTA may not be available. Examination of the broad grounds for which tax refunds may be had under MCL 205.30, as referenced by and incorporated within MCL 207.1047, reflects the Legislature's intent to furnish multiple rationales for use by taxpayers to obtain redress of an erroneous, unjust, excessive, or wrongful tax. When interpreting statutes, courts must ascertain and give effect to legislative intent by examining the words used by the Legislature. *Massey v Mandell, 462 Mich 375, 379; 614 NW2d 70 (2000).* Allegiance to the language used by the Legislature in MCL 207.1047 and MCL 205.30 compels the

conclusion that Daimler has overpaid MFT because it has remitted more than is lawfully due, and therefore is entitled to proceed under MCL 205.30 to receive its claimed refund.

3. ***The decision of the Court of Appeals is "clearly erroneous" and warrants review under MCR 7.302(B)(5) in that the Court failed to take stock of the Department's own published pronouncement that, as a matter of policy, fuel added to the tanks of manufactured motor vehicles that are shipped to non-Michigan destinations for use and consumption is not subject to MFT.***

This pronouncement, LR 90-12, was referenced by the Court of Appeals in its decision in *Ammex v Dep't of Treasury, 237 Mich App 455; 603 NW2d 308 (1999), lv den 463 Mich 885; 618 NW2d 596 (2000), cert den 534 US 827; 122 S Ct 67; 151 L Ed 2d 34 (2001),* a case in which the taxpayer, a gasoline retailer, unsuccessfully contended that the Department had discriminated against it in deciding to subject its gasoline purchases to tax, but not those of automobile manufacturers for fuel added to the tanks of manufactured motor vehicles shipped to dealers outside of Michigan. LR 90-12, included with this *Application* as Exhibit "C," in forthright fashion declares the Department's "policy" that gasoline that automobile manufacturers place in the fuel supply tanks of manufactured motor vehicles shipped outside of Michigan is not subject to motor fuel tax. LR 90-12 identifies the Department's policy as follows:

> (a) The Michigan gasoline tax does not apply to gasoline that is placed in the fuel supply tanks of new motor vehicles manufactured by a corporation located in Michigan and shipped to locations outside of Michigan.
>
> (b) The Michigan gasoline tax is applicable to gasoline placed in the fuel supply tanks of new motor vehicles whether manufactured within or outside of Michigan and shipped to locations within Michigan, excluding from taxation only gasoline consumed in off-highway testing and shipping activities.

Although this Letter Ruling was issued at a time when the former version of the MFTA applied, it is clear that the rationale for the ruling – that fuel supplied to vehicle tanks in the manufacturing process is outside the ambit of the MFTA – applies as well in the new MFT setting. The former enactment did not contain a provision that squarely addressed the plight of vehicle manufacturers and their use of motor fuel in their industrial processes, and yet the Department expressly recognized that, under that enactment, motor fuel was not payable by the manufacturers. The Department has not openly repudiated the content or scope of LR 90-12 since its issuance, so that one can only conclude that it continues to apply. ***More importantly, the circumstances of this case permit no different determination, for just as was formerly the case, Daimler and manufacturers similarly situated to it do not use or consume the motor fuel in question in traveling over Michigan public roads and highways, and therefore continue to fit within the Department's policy to exclude them from taxation.***

4. The decision of the Court of Appeals is "clearly erroneous" and warrants review under MCR 7.302(B)(5) because the Court completely ignored special rules applicable to the proper interpretation of tax laws.

Because they affect a "taking" from the taxpayer, ambiguous tax statutes must be construed in favor of the taxpayer, and against the revenue authority. *See, Michigan Bell Telephone Co v Dep't of Treasury, 445 Mich 470, 477; 518 NW2d 208 (1994); Hart v Dep't of Revenue, 333 Mich 248, 251; 52 NW2d 685 (1952); Ecorse Screw Machine Products Co v Corporation & Securities Comm, 378 Mich 415, 418; 145 NW2d 46 (1966); Himelhochs of Northland, Inc v State Tax Comm, 26 Mich App 172, 175; 182 NW2d 105 (1970); Czars, Inc v Dep't of Treasury, 233 Mich App 632, 637; 593 NW2d 209 (1999); Michigan Milk Producers, Ass'n v Dep't of Treasury, 242 Mich App 486; 618*

NW2d 917 (2000). The Court of Appeals' decision in this case evinces a concerted effort to throw up barriers to this taxpayer's good faith efforts to demonstrate why it is eligible for the requested MFT refund, and is not at all indicative of an acknowledgment of this generally-recognized tenet governing the interpretation of tax laws. Allegiance to the concept of "liberal construction favoring the taxpayer" on the part of the lower court would have engendered a far different result, one favorable to this taxpayer.

5. The decision of the Court of Appeals is "clearly erroneous" and warrants review under MCR 7.302(B)(5) because the Court failed to apprehend that, if no mechanism for relief is accorded this taxpayer under the MFTA when it is clear that the taxpayer's use of motor fuel is not within the expressly stated intend of the enactment, it has been denied its rights to due process as guaranteed under the United States and Michigan constitutions.

In its *Opinion,* the Court of Appeals disagreed with Daimler's assertion that its due process rights are patently violated in a situation in which, although the governing statute provides several mechanisms whereby a taxpayer can obtain relief from payment of MFT that is not properly payable, none encompass this taxpayer ***even though it is a foregone conclusion that its use or consumption of motor fuel is not within the expressly-stated intent of the MFTA.*** In the lower court's estimation, there is no due process violation if a taxpayer simply fails to qualify for a tax refund under the prevailing enactment. *See,* Exhibit "A," p 8.

Daimler submits that the due process assertions it maintained below are wholly viable. In implementing its taxing schemes in a manner that comports with the dictates of the Due Process Clause, US Const, Am XIV; *see also,* Const 1963, art 1, § 17, Michigan may provide a taxpayer with "a meaningful opportunity . . . to withhold contested tax assessments and to challenge their validity in a predeprivation hearing," *McKesson Corp*

v Div of Alcoholic Beverages and Tobacco, 496 US 18, 39-40; 110 S Ct 2238; 110 L Ed 2d 17 (1990). If, however, no "meaningful opportunity" to contest before payment is accorded the taxpayer by means of a predeprivation hearing, Michigan is required to accord the taxpayer "meaningful backward-looking relief to rectify any unconstitutional deprivation," *McKesson at 31.* "Meaningful backward-looking relief" may take on various forms, and may include the fashioning of a refund, or issuance of an order that rectifies the difficulty. *McKesson at 40.* But Michigan's postdeprivation remedy cannot be an illusion – the state cannot hold out as its postdeprivation remedy a taxpayer's right to claim a refund for an inappropriately or unlawfully overpaid tax, only to then assert that no such refund opportunity exists, *Reich v Collins, 513 US 106; 115 S Ct 547; 130 L Ed 2d 454 (1994).*

The Court of Appeals' determination of this constitutional claim sustains the illusory nature of the so-called remedies set forth in the MFTA, and trivializes and demeans Daimler's position in this case, for clearly, this is not a stock situation in which a taxpayer perversely proclaims its right to a refund for, say, a use tax that it claims it does not owe, but that is otherwise payable in accordance with the Use Tax Act. It goes without saying that a taxpayer cannot claim a right to a refund simply because it believes it is owed one – yet this is precisely the category to which the Court of Appeals attributes Daimler's claims. To the contrary, Daimler's position simply is that, when one recognizes (as one must) that its use of motor fuel under these circumstances is not within the intendment of the MFTA, and thus reflects a true nontaxable use of the fuel, it is a hollow right, indeed, for it to be accorded a post-deprivation remedy – pursuit of a refund action in the Michigan Tax Tribunal or Michigan Court of Claims – through which no

refund in fact possibly can be obtained. This Court should accept this case for review of all of the issues presented by the Court of Appeals' erroneous decision, including this significant issue that considers the constitutional implications of a tax scheme that purports to quench the taxpayer's thirst for tax refunds, but offers only an empty glass.

II. THE PRIMARY ISSUE PRESENTED BY THIS CASE – WHETHER THE MFTA PROVIDES A MECHANISM WHEREBY A TAXPAYER WHO HAS PAID MOTOR FUEL TAX FOR A USE OF MOTOR FUEL THAT IS NOT WITHIN THE INTENDMENT OF THE MOTOR FUEL TAX ACT MAY RECEIVE A REFUND OF THE TAX – HAS SIGNIFICANT PUBLIC INTEREST AND INVOLVES AN AGENCY OF THE STATE OF MICHIGAN; PRESENTS LEGAL PRINCIPLES OF MAJOR SIGNIFICANCE TO THIS STATE'S JURISPRUDENCE; AND INVOLVES A SUBSTANTIAL QUESTION AS TO THE VALIDITY OF A LEGISLATIVE ACT, SO THAT AMPLE GROUNDS FOR REVIEW BY THIS COURT EXIST UNDER MCR 7.302(B)(1), (2) AND (3).

Undoubtedly – and for the variety of reasons expressed earlier in this *Application* – the Court of Appeals has overstepped its bounds in this case in determining that Daimler may not avail itself of relief under existing provisions of the MFTA, and that no due process deprivation has been occasioned by the Act's failure to provide a refund mechanism to this taxpayer. The current version of the MFTA is of recent origin, and as yet has not been tested in Michigan's appellate venues. Taxpayers like Daimler who, under the present statutory scheme, have no choice but to pay MFT up front and then seek a refund for instances in which the tax is not due or otherwise payable, as well as the public at large, have a considerable interest in having this enactment correctly interpreted in alignment with fairly and accurately applied rules of statutory interpretation. The lower Tribunal and court failed to recognize that statutes imposing a tax are to be strictly construed in favor of the taxpayer, and against the government. Taxpayers – both this one and taxpayers in general – are entitled to have any doubts relative to imposition of a

tax determined in their favor, inasmuch as their financial and property rights are implicated when the government asserts its taxing powers.

In addition, the taxpaying general public has an extreme interest in ensuring that the language of tax enactments will not be so narrowly construed – as the lower Tribunal and court have neatly accomplished here – so as to foreclose legitimate claims the taxpayer has to a refund of improperly paid taxes. It is unrealistic, illogical, and downright confiscatory for this state's revenue authority to, in its "finders/keepers" mentality, deny a taxpayer's claim to a refund of a tax that is, without a doubt, outside the scope of the tax enactment ***as clearly stated by the Legislature within the confines of the enactment itself.***

In addition, because this matter calls into question the validity of the MFTA insofar as it purports (according to the MTT and Court of Appeals) to provide no mechanism whatsoever for Daimler to recover a properly refundable tax, the case involves "a substantial question as to the validity of a legislative act," MCR 7.302(B)(1), and justifies review by this Court.

In furtherance of sound public policy, and in the advancement of Michigan jurisprudence, this Court should undertake review of this matter, rectify the extreme errors found in the Court of Appeals' Opinion, and resolve any doubts, ambiguities, or difficulties in favor of this taxpayer, consistent with appropriate and accepted rules of statutory interpretation. As Daimler has contended throughout this proceeding, the MFTA does provide avenues for relief to it under these facts, and if it does not, some relief provision must be carved out to comport with constitutional due process dictates. In short, now is the time to smooth out the "rocky road" engendered by the

Department's, Tax Tribunal's, and Court of Appeals' renditions in this case, and to pave the way for appropriate treatment of the circumstances affecting this significant taxpayer.

CONCLUSION AND RELIEF SOUGHT

This case has wide-reaching implications in casting a most unfavorable shadow on the taxation of the activities of Michigan vehicle manufacturers, and is demonstrative of the Department's repeated efforts to find some way – any way – to reject this taxpayer's legitimate claims of entitlement to MFT refunds. In the former case affecting the identical parties, the Department purported to make Daimler adhere to a limitations period that, as stated in the enactment, was virtually unreadable and in no sense could be construed as applicable to it. But, as this Court demonstrated with the action it took in reversing the Court of Appeals' determination by *Order,* the Department was not invincible in its dictates. Under the current enactment, the Department no longer has an opportunity to contest the timeliness of Daimler's refund claims, and so, as outlined in this *Application,* has offered some other equally untenable reasons why this taxpayer should not receive tax refunds rightfully due it. Daimler respectfully requests that this Court *again* put a stop to the Department's continued efforts to defeat its MFT refund claims on any count. The "strict construction of ambiguous tax legislation in favor of the taxpayer" tenet of statutory interpretation directly applies – it recognizes that a taxpayer should not be obligated to bear the burden of a tax that does not clearly apply to it in whole or in part. Here, without a doubt, any ambiguity relative to whether Daimler qualifies as an "end user," under §33 or §39 of the MFTA, or can otherwise obtain relief under MCL 205.30, must be resolved in Daimler's favor, requiring reversal of the Court of Appeals' determination to the contrary. And if the MFTA allows Daimler to proceed to the MTT or the Court of Claims for a determination of its assertions concerning its

right to a MFT refund but no provision exists through which the refund may be paid, a due process violation decidedly exists.

The foregoing reasons set forth in Petitioner-Appellant's *Application for Leave to Appeal* illustrate multiple, appropriate grounds under MCR 7.302(B)(2), (3), and (5) upon which this Court should grant the *Application,* and permit Petitioner-Appellant, DaimlerChrysler Corporation to appeal from the Court of Appeal's *Opinion* dated November 1, 2005.

Respectfully submitted,

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Dated: December 13, 2005

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